Tsen Kyun Tshin v Lee Tse Khiong

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24-126 OF 1997(IIII/II)
MUHAMMAD KAMIL J
28 FEBRUARY 1998

Land Law *— Restraints on dealings — Caveats — Application for removal of caveat — Delay of seven years since caveat was lodged — Whether there was inordinate and inexcusable delay*

The plaintiff applied in 1997 to revoke the defendant's caveat lodged on its land on 18 June 1990. Counsel submitted that the defendant had failed to take any action since the caveat was lodged over seven years ago, and well over 10 years after the land was said to be illegally transferred.

Held, allowing the application with costs:

The defendant, having entered a caveat to protect the interest in the land, had not, with reasonable diligence, gone on to assert that right. The delay of 7½ years after lodging the caveat is an inordinate and inexcusable delay. The caveat should therefore be removed forthwith with costs (see p 322D).

[Bahasa Malaysia summary

Plaintif telah memohon pada tahun 1997 untuk membatalkan kaveat defendan yang dimasukkan atas tanahnya pada 18 Jun 1990. Peguam menghujahkan bahawa defendan telah gagal mengambil sebarang langkah sejak kaveat dikemukakan lebih daripada tujuh tahun yang lalu, dan jauh melebihi 10 tahun selepas tanah dikatakan dipindahkan menyalahi undang-undang.

Diputuskan, membenarkan permohonan dengan kos:

Setelah memasukkan kaveat untuk melindungi kepentingan dalam tanah, defendan telah tidak terus menegaskan hak itu dengan ketekunan berpatutan. Kelewatan selama 7½ tahun selepas memasukkan kaveat adalah kelewatan terlampau dan tidak boleh dimaafkan. Maka kaveat haruslah dibatalkan serta merta dengan kos (lihat ms 322D).]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2419.

Cases referred to

Forward Metal Works Sdn Bhd v Perbadanan Pembangunan Ekonomi Sarawak Originating Motion No KG 7 of 1988 (unreported) (refd)

Plimmer Bros v St Maur (1906) 26 NZLR 294 (refd)

Teo Ai Choo v Leong Sze Hian [1982] 2 MLJ 12 (refd)

Legislation referred to

Land Code (Sarawak Cap 81) s 179

Fabian Lim (*Lim & Lim*) for the plaintiff.

Jimmy Simon Maja (*Maja Ngui & Co*) for the defendant.

Muhammad Kamil J: In this application, the plaintiff prays for the following orders:

(a) that the caveat under Instrument No L 1730/1990 registered at the Kuching Land Registry on 18 June 1990 affecting Lot 1290 Block 207, Kuching North Land District be forthwith removed;

(b) that an inquiry be made as to the damages sustained by the plaintiff by reason of the said caveat pursuant to s 179 of the Sarawak Land Code (Cap 81); and

(c) the costs of and incidental to this application be taxed.

The application is supported by the affidavit of Ho Ho Shen @ Ho Ho Chim affirmed on 23 August 1997 and served on the defendant's advocates on 1 December 1997.

The brief facts of the case are as follows:

The defendant had taken loans totalling RM242,000 from Ho Ho Shen @ Ho Ho Chim, vide the deed of agreement dated 27 September 1985 and the Memorandum of Variation of Charge No L12669/1985 exhibited as 'TKT2' and 'TKT4' respectively.

By March 1987, the defendant was unable to repay the said loans as promised. The defendant had been duly informed by Ho Ho Shen that he would exercise the option granted to him by the defendant under the deed of agreement by transferring the said land to the plaintiff.

By a Memorandum of Transfer Instrument No L2734/1987, the said land was transferred to the plaintiff.

On 18 June 1990, the defendant lodged a caveat in the said land alleging that Ho Ho Shen was not permitted to sell the land unless with his written consent. Seven years later, on 16 February 1997, the defendant wrote a letter to the plaintiff alleging that Ho Ho Shen had misused the power of attorney in transferring the said land to the plaintiff.

The plaintiff and Ho Ho Shen wanted to develop the land and had submitted to the relevant authorities the sub-division and the engineering plans of the said land which were approved. A developer engaged by the plaintiff, had commenced the infrastructure works since September 1996.

A The plaintiff now wants to apply for separate issue of document of title in respect of the houses to be built on the said land so that they can be sold to individual house buyers. This can be done only when the caveat is removed.

At the hearing of this application, learned counsel, Mr Fabian Lim, B submitted that the defendant had failed to take any action since the caveat was lodged on 16 June 1990, a period of well over seven years, and well over 10 years after the said land was transferred. The defendant had no reasonable explanation for this inordinate delay.

Learned counsel for the defendant, Mr Jimmy Simon Maja, had no C explanation to offer for the long delay in taking action. As a matter of fact, he could not respond to the plaintiff's counsel's submission. He impressed me that he was ill prepared for the case or could not understand the issue before the court that he was not able to say anything during the hearing. Had he known the fundamental of law well, he would have well advised his client not to appeal because to do so would mislead his client and penalise D him in additional costs.

In the affidavit-in-opposition, the defendant explained that it was only on 30 August 1997 that he came to know that the defendant was not a licensed money lender. This is not true and quite contrary to what he had stated in a statutory declaration dated 16 June 1990, para 4, that 'the said E Ho Ho Shen @ Ho Ho Chim (BICK 523042) is not a licensed money lender ...'.

It is also observed that the defendant had been avoiding the service of this originating summons and after several attempts at service at his present address failed, the plaintiff was left with no choice but to serve it by substituted service. All these delays clearly indicate that the defendant's F contumelious conduct had given rise to a substantial risk that a fair trial would not be possible or would cause serious prejudice to the plaintiff.

In *Plimmer Bros v St Maur* (1906) 26 NZLR 294, Stout CJ in an application to remove a caveat, referred to several reported cases and said:

G > It was his duty to commence an action promptly if he considered himself entitled to specific performance. ... Here nothing was done for nearly 16 months, and then a caveat was lodged. More than a month has lapsed since then, and still no action has been commenced. In my opinion, an action for specific performance under such circumstances would be hopeless, and a caveat under such circumstances must be deemed vexatious. ... in my H opinion, to prevent a man dealing with his property after such a long delay is so inequitable that the court will not lend its assistance to such a proceeding.

This was accepted with approval by the Singapore case of *Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12. In that case, there was a delay of 11 months and the court ordered the caveat be removed. The learned judge in that case went on to refer to a Singapore decision of the learned I CJ in Originating Summons No 192 of 1976 where he held that a delay of 2½ months was sufficient for a caveat to be removed forthwith. In *Forward Metal Works Sdn Bhd v Perbadanan Pembangunan Ekonomi Sarawak* Originating Motion No KG 7 of 1988 (unreported), Tan Chiaw Thong J held that:

In my view, it seems clear that this civil suit was prompted by the institution of the present proceedings against the respondent, because despite what was stated in the statutory declaration of Nicholas Gunjew, the respondent had taken no steps to legally enforce its alleged right against the applicant until some months after the institution of these proceedings.

... It is also, in my view, a relevant factor to take into consideration the delay on the part of the respondent in instituting the civil suit which it is stated was filed on the first of this month against the applicant. In this connection, in the case of *Re Thomson And Chipps; ex p Findly* (1886) 5 NZLR 52, part of the headnote reads:

> 'Where a person claims the right to specific performance of any contract involving an interest in land under the provisions of the Land Transfer Act, and enters a caveat to protect that interest, he must, with reasonable diligence, go on to assert the right claimed, or the court will order the caveat to be removed.'

In the instant case, the defendant, having entered a caveat to protect the interest in the said land, had not, with reasonable diligence, gone on to assert that right. The delay of 7½ years after lodging the caveat is, to my mind, an inordinate and inexcusable delay. I would order that the caveat be removed forthwith with costs. And I would also order that an inquiry be made as to the damages sustained by the plaintiff by reason of the said caveat under s 179 of the Sarawak Land Code.

Application allowed with costs.

Reported by Loo Lai Mee